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In the Supreme Court of the United States

OCTOBER TERM, 1974

ANTHONY S. CAROLLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that his inculpatory statements made to an agent of the federal Bureau of Alcohol, Tobacco, and Firearms during a routine investigation of his restaurant should have been suppressed because the agent did not give him the warnings prescribed by *Miranda* v. *Arizona*, 384 U.S. 436.

After a trial before a United States Magistrate for the Eastern District of Louisiana, petitioner, a retail liquor dealer, was convicted of purchasing distilled spirits for resale from a person who was neither exempt from nor had paid the wholesale dealer's tax, in violation of 26 U.S.C. 5117(a). Imposition of sentence was suspended and petitioner was placed on 6 months' inactive probation and fined $50. The conviction was affirmed without opinion by the district court (App. 96),[1] and by the court of appeals (Pet. App. A; 507 F.2d 50).

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[1] "App." refers to the Appendix in the court of appeals.

The undisputed evidence established that petitioner purchased, for resale in his restaurant, four bottles of distilled spirits from the "L & J Liquor Store," whose operators were neither exempt from nor had paid the federal wholesale dealer's tax.

On June 8, 1972, Agent Albert L. Klotz of the Bureau of Alcohol, Tobacco, and Firearms, Department of the Treasury, together with other agents went to petitioner's restaurant to conduct a routine "retail dealer's inspection." Agent Klotz identified himself and advised petitioner that the purpose of the visit was to examine his records, liquor stock, and federal tax stamp. Petitioner offered to help the agents in any way he could (Pet. 9), and then continued to conduct his business as usual, moving about and greeting and serving customers (App. 53-55, 60-61; Pet. 9-10).

During the inspection Agent Klotz noticed behind the bar a number of bottles bearing price labels similar to those used by retail liquor distributors. He then asked petitioner where he purchased his liquor. Petitioner named about six wholesalers, Agent Klotz asked "if that was all," and petitioner replied that when he ran short he purchased some from a friend who owned a retail liquor store. Agent Klotz asked petitioner to identify the store, which petitioner did, and whether the bottles bearing price labels in fact had been purchased from the store. Petitioner responded affirmatively and the agents thereupon took custody of about 24 of the bottles (App. 56-58, 63-65).

Petitioner contends that under these circumstances he was entitled to receive the warnings prescribed in *Miranda* v. *Arizona*, 384 U.S. 436, 444, 478-479, before being questioned by Agent Klotz. But in *Miranda* this Court said that the warnings need only be given prior to "custodial interrogation," defined to mean "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. Here the court of appeals properly found that petitioner was not in custody during the routine investigation conducted by the federal agents (Pet. App. A 46-47, 49).

At the time of questioning there was no probable cause to arrest petitioner, and the evidence indicated that both the agents and petitioner believed that he was at liberty to leave at any time he might have wished (*ibid.*; App. 61). Indeed, during the investigation petitioner freely moved about his restaurant, meeting and waiting on customers.

This case is thus considerably different from *Orozco* v. *Texas*, 394 U.S. 324, where one of the arresting officers testified that the defendant was not free to go from the moment he identified himself to the four policemen who had entered his bedroom at 4:00 a.m. to question him, and from *Mathis* v. *United States*, 391 U.S. 1, where the defendant was interrogated while already in prison serving a state sentence. In those cases the defendant when questioned was clearly "in custody" for purposes of *Miranda*; in the case at bar petitioner was just as clearly unrestrained and Agent Klotz was not required to give him *Miranda* warnings.

Petitioner's heavy reliance on *United States* v. *Dickerson*, 413 F.2d 1111 (C.A. 7), is misplaced. In that case, following a civil investigation of the defendant by agents of the Internal Revenue Service, the investigation became criminal and the defendant was questioned on five separate occasions without being advised of his rights. The Seventh Circuit held that warnings were required once the full criminal investigation had been launched, but

were not necessary so long as the investigation remained civil in nature. In the case at bar it was not clear that the questioning of petitioner by Agent Klotz "constituted a criminal investigation which had focused upon" petitioner rather than "mere administrative inquiries" (Pet. App. A 48). And the court of appeals correctly noted that, even assuming that the questioning had become part of a criminal investigation, this fact alone was insufficient "to create a custody situation" (*ibid.*).[2]

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

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[2]To the degree *Dickerson* is inconsistent with the instant case it represents too great a departure from *Miranda's* requirement that warnings precede "custodial interrogation." In *Dickerson* the court as much as conceded that the defendant was not in custody when questioned, but insisted on warnings nonetheless to guard against "the taxpayer's misapprehension as to the nature of the inquiry, his obligation to respond, and the possible consequences of doing so." 413 F.2d at 1116. And the court recognized that its holding "represents a departure from the present state of the law, and a new implementation of the *Miranda* policy." *Id.* at 1117.

The other ten circuit courts of appeals have specifically rejected *Dickerson*. *United States* v. *Dawson*, 486 F.2d 1326, 1329 (C.A. 5), collects the cases from each of the circuits save that for the District of Columbia, which joined the others only recently. We have asked this Court to issue a writ of certiorari to the latter court and summarily affirm, thus ending the conflict created by the Seventh Circuit's continued adherence to *Dickerson*. See our Memorandum in *Beckwith* v. *United States*, petition for a writ of certiorari pending, No. 74-1243.